

## **Maqsood (Migration) [2017] AATA 1308 (1 August 2017)**

### **DECISION RECORD**

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|---------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>          | Migration & Refugee Division                                                                                                                                                                                                                                                                                                                                                                |
| <b>REVIEW APPLICANT:</b>  | Mr Shah Maqsood                                                                                                                                                                                                                                                                                                                                                                             |
| <b>VISA APPLICANT:</b>    | Ms Aziza ELJYLY                                                                                                                                                                                                                                                                                                                                                                             |
| <b>CASE NUMBER:</b>       | 1614550                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>DIBP REFERENCE(S):</b> | BCC2016/1364011 OSF2016/030295                                                                                                                                                                                                                                                                                                                                                              |
| <b>MEMBER:</b>            | Christine Kannis                                                                                                                                                                                                                                                                                                                                                                            |
| <b>DATE:</b>              | 1 August 2017                                                                                                                                                                                                                                                                                                                                                                               |
| <b>PLACE OF DECISION:</b> | Perth                                                                                                                                                                                                                                                                                                                                                                                       |
| <b>DECISION:</b>          | <p>The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:</p> <ul style="list-style-type: none"><li>• cl.309.211(2) of Schedule 2 to the Regulations</li><li>• cl.309.221 of Schedule 2 to the Regulations</li></ul> |

Statement made on 01 August 2017 at 11:34am

### **CATCHWORDS**

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 – Consistent evidence – Valid marriage – Mutual commitment – genuine and continuing relationship

### **LEGISLATION**

*Migration Act 1958*, ss 5F, 65

*Migration Regulations 1994*, Schedule 2, cl.309.211, cl.309.221, r 1.15A(3)

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 4 September 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 5 April 2016 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211 and cl.309.221.
3. The delegate refused to grant the visa on the basis that the visa applicant did not meet cl.309.211(2) because the delegate was not satisfied that the visa applicant's relationship with the review applicant met the definition of spouse under the Act.
4. A copy of the Decision Record was submitted to the Tribunal by the review applicant for the purposes of the review.
5. The review applicant appeared before the Tribunal on 29 June 2017 to give evidence and present arguments. The Tribunal also received oral evidence by telephone from the visa applicant. The Tribunal received evidence by telephone from two friends of the review applicant, Khalid Nikzai and Fardeen Habibi.
6. The Tribunal was assisted by an interpreter in the Arabic and English languages.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

8. The issue in the present case is whether the relationship between the visa applicant and the review applicant meets the definition of 'spouse' in section 5F of the Act.
9. Section 5F provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
10. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

11. The visa applicant is a 26 year old Moroccan woman. The review applicant is a 26 year old man and is an Australian Permanent Resident.
12. The review applicant and the visa applicant met on a dating site in November 2014. They continued to communicate over the internet and by video and phone calls for 13 months. They first met in person on 23 January 2016 in Agadir in Morocco and on 2 March 2016 they were married in Agadir. The review applicant returned to Australia on 16 March 2016.
13. On 5 April 2016 the current application for a Partner visa was lodged.
14. The Department conducted an interview with the visa applicant on 7 June 2016. The Tribunal had regard to the interview notes which recorded the questions asked of the visa applicant and her responses.
15. The Tribunal had significantly more documentary evidence before it than was available to the delegate.

16. **Whether the parties are in a spouse or de facto relationship**

17. **Are the parties validly married?**

18. If the parties are validly married they may meet the requirements of a spousal relationship, but not a de facto relationship. A Marriage Certificate indicating the date of the marriage was 2 March 2016 and the place of marriage was Agadir, Morocco was provided.
19. On the basis of the written evidence before it the Tribunal concludes that the marriage satisfies the requirements for a valid marriage for the purpose of the Act as required by s.5F(2)(a).

20. *Financial aspects*

21. The Tribunal considered the evidence in relation to the financial aspects of the parties' relationship including the extent of pooling of financial resources and any sharing of day-to-day household expenses.
22. A Western Union transfer dated 23 December 2015 showing that the review applicant sent the visa applicant \$335 was provided. Documentary evidence of withdrawals from a Commonwealth Bank account in the review applicant's name to a Commonwealth Bank account ending in the numbers "4937" was provided. Documentary evidence of withdrawals from a Commonwealth Bank Travel Money Card ending in the numbers "4937" was provided.
23. The review applicant told the Tribunal that since March 2016 he has sent the visa applicant about \$500 to \$600 per month. The visa applicant does not work and he said she uses the money to pay her living expenses. At one time she also used the money he sent to purchase gold in preparation for their cultural wedding ceremony which took place when he visited the visa applicant in Morocco in October 2016. The review applicant said they use a Travel Money Card because Western Union charges are too expensive.
24. The Tribunal finds that the review applicant's financial support of the visa applicant is an indicator of a genuine and continuing spousal relationship.

25. *Nature of the household*

26. The review applicant resides in Australia and the visa applicant resides in Morocco. Since their marriage the parties have lived alone together for a period of two weeks only, from the date of the marriage until the review applicant returned to Australia on 16 March 2016.
27. The review applicant travelled to Morocco to see the visa applicant in October 2016 and he returned to Australia in December 2016. During this time the review applicant and the visa applicant lived with the visa applicant's mother in her home.
28. Given that the parties have lived in different countries for most of their relationship and that they have lived alone together for only two weeks, the Tribunal decided they have not had an opportunity to set up a household together. As such the Tribunal places no weight on this factor.

29. *Social aspects of the relationship*

30. The Tribunal considered the evidence in relation to the social aspects of the relationship including whether parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.
31. The evidence before the Tribunal included photos, statements made by the visa applicant's mother and by a friend of the visa applicant. Two statutory declarations made by friends of the review applicant were also provided.
32. The review applicant told the Tribunal he has met the visa applicant's mother, brother, uncles and aunts. He has also met her friends, one named Meriam. He said Meriam had spent time with he and the visa applicant during both his trips to Morocco.
33. In her statement dated 21 April 2016 the visa applicant's mother said her daughter had been in a relationship with the review applicant for more than a year and they had married. The Tribunal noted that the statement was in English and asked the review applicant whether the visa applicant's mother was able to read and write English. He said she cannot read and write English and said the statements had been translated by a relative. No certification of translation was provided and the Tribunal placed no weight on this evidence.
34. A statement dated 22 April 2016 made by Meriam was provided. Meriam stated that she had witnessed the parties' marriage in March 2016. The Tribunal noted that the statement was in English and asked the review applicant whether Meriam was able to read and write English. He said she cannot read and write English and said the statements had been translated by a relative. No certification of translation was provided and the Tribunal placed no weight on this evidence.
35. The Tribunal had regard to the statutory declarations made by two of the review applicant's friends and noted that neither of the declarants had spent time with the parties together and had not met the visa applicant in person. The reasons each declarant provided were also general in nature and unhelpful. As such the Tribunal placed no weight on this evidence.
36. One of the declarants, Mr Nekzai, also provided oral evidence to the Tribunal during the hearing. Mr Nekzai said he is the review applicant's housemate and said the review applicant contacts the visa applicant very night. He said he has talked to her many times too and that he first talked to her in 2016.
37. The Tribunal also received oral evidence from Mr Habibi. Mr Habibi told the Tribunal that he has not spent time with the parties together and he has not met the visa applicant in person. He said he has spoken to her over the phone 10 to 15 times.

38. The review applicant told the Tribunal that the visa applicant has not met his family in person as yet but she has met his parents, his sister, his brother and his uncle by phone.
39. The review applicant said he and the visa applicant had been planning to travel together in July 2017 however after he received the Invitation to the hearing they did not proceed. He said they will probably travel in July 2017 or August 2017 and said they might meet up in Malaysia or he might just travel to Morocco.
40. There was limited satisfactory evidence provided to demonstrate social recognition of the parties' relationship. Based on the evidence, the Tribunal was unable to find that the parties represent themselves to their respective families, friends and others as being married to each other.

41. *The nature of the parties' commitment*

42. The Tribunal considered the nature of the persons' commitment to each other including duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.
43. The review applicant told the Tribunal that from March 2016, he and the visa applicant have not missed a day without communicating with each other. He provided Vodafone telephone records which showed calls of long duration and calls of very short duration. Regarding the latter he said the reason for those calls were to ask the visa applicant to go online so they could communicate for a longer period. He said sometimes they talk to each other online for up to three hours. The Tribunal noted that two different phone numbers were highlighted in the Vodafone records. The review applicant said the visa applicant lost one of her phones and he had to replace it. The phones had different numbers.
44. The review applicant said they are unable to sleep if they have not spoken to each other. He also told the Tribunal he sees couples together at the gym and he becomes distressed and questions why the visa applicant has not been permitted to be with him. He said he has discussed his feeling with a doctor and has been told he suffering stress.
45. The visa applicant's evidence with respect to the daily contact the parties have was consistent with the review applicant's evidence.
46. The review applicant was in a previous relationship (discussed later in these Reasons) which he said ended in late 2015, 12 months after he and the visa applicant first met online. He said the nature of his relationship with the visa applicant from the time of their first communication until they first met in person was friendship only but when they met in January 2016 they fell in love. When asked about the nature of their relationship the visa applicant said they liked each other until they met in person after which they loved each other.
47. Despite the apparent swiftness of the ending of the review applicant's previous relationship and the transition of the parties' relationship from friendship to partners, the Tribunal accepted this evidence.
48. When asked about their future plans the review applicant and the visa applicant both told the Tribunal that they want to work, study, buy a house and have children.
49. The Tribunal asked the review applicant what it would mean to him if the visa is not granted. He said it would destroy his life because he cannot live without his wife.

50. The Tribunal asked the visa applicant what it would mean to her if the visa is not granted. She said it would destroy her dreams to have a family with her husband.

51. *Information under 359AA*

52. The Tribunal had regard to certain documentary evidence and put this information to the review applicant pursuant to s.359AA of the Act. The Tribunal informed him that subject to his comment or response, the information would be the reason, or part of the reason, for the Tribunal to affirm the decision under review.

53. The Tribunal referred the review applicant to the interview notes which recorded that the visa applicant initially said she and the review applicant had lived together in a rented apartment in Morocco before they married. The delegate noted that the visa applicant subsequently changed her statement and said she had meant that she spent time with the review applicant in his apartment during daytime but not overnight before they married.

54. The Tribunal also referred the review applicant to a written statement made by him dated 2 April 2016 he said he had lived with the visa applicant in an apartment for 50 days in Morocco. The Tribunal also pointed out that in Meriam's written statement dated 22 April 2016 she said that the visa applicant had lived with the review applicant in an apartment for over 45 days.

55. The Tribunal noted the inconsistent documentary evidence and his oral evidence that he and the visa applicant had only lived together for two weeks after they married. The review applicant said before they married they spent the days together but the visa applicant did not stay overnight at the apartment. He said that he and Meriam should have said the parties spent time together and that they had both been mistaken in saying the parties had lived together.

56. The Tribunal acknowledges that some cultures frown upon couples living together before marriage and decided that this may have been the reason for the inconsistent evidence.

57. The documentary evidence showed the review applicant has previously sponsored an applicant for a partner visa. The Tribunal referred to the application for the current visa which indicated that this previous relationship commenced on 1 January 2010 and ended on 1 November 2015 and that the relationship was based on their parents' choice for them to be engaged from childhood. He said when they grew up they realised they were not happy and they broke up.

58. In a written statement dated 4 April 2016 the review applicant said he had been engaged by customs in Afghanistan according to a family decision when he was a child. He stated that when he and his former partner grew up, they disagreed about the relationship and when he came to Australia she called him and started talking but the relationship did not go well and they broke up.

59. In an email the review applicant sent the Department on 7 January 2016 he said that due to family problems his former partner did not want him anymore and he said their relationship ended on 20 September 2015.

60. The Tribunal put the information regarding his previous relationship to the review applicant and in particular asked him about the beginning and end of the relationship. He said when they were children their parents knew each other but not well. At that time they chose this girl for him and her parents agreed. He said in 2010 he decided to marry this girl and they were in a boyfriend/girlfriend relationship from 2010 to 2014. When he came to Australia he asked his family to visit her family and they accepted that their daughter would marry him.

61. The review applicant said that after her family's acceptance his former partner asked him to send her money so she could buy gold to prepare for their marriage. He sent her \$7,000 and he later found out that she had used the money to send her brother to Sweden. In the meantime his mother had been attending his previous partner's family's home with gifts in accordance with their customs. The review applicant told the Tribunal that during these visits his former partner was being rude to his mother. He said his former partner told him that he had to send her \$70,000 otherwise he could forget about their relationship. He did not have \$70,000 having only been in Australia for six or seven months at that time. He said he started to lose the trust he had in her.
62. The review applicant was unable to explain the discrepancy in the dates he had provided regarding when the relationship ended. He said his previous relationship ended in late 2015 although he could not provide an approximate date except to say it was sometime between September and November.
63. The Tribunal noted that the application for the current partner visa and the review applicant's email sent on 7 January 2016 both state that he lodged the former partner visa on 22 July 2015, which was several months after he had commenced communicating with the visa applicant. The Tribunal put to him that he had lodged the previous partner visa application at a time when he was pursuing a relationship with the visa applicant and that this suggested the previous partner visa application was based on a relationship that was not genuine. He said he lodged the previous partner application because of pressure from his family and because he hoped his previous partner might change. The Tribunal did not consider either of these reasons to be an acceptable basis for lodging the previous partner visa application.
64. The Tribunal noted that the review applicant did not withdraw his sponsorship of his previous partner until January 2016, just prior to when he travelled to Morocco to meet the visa applicant in person. He referred to trying to withdraw his sponsorship earlier and the return of money from his previous partner's family to his family. The review applicant did not provide a satisfactory reason for not withdrawing his sponsorship in late 2015.

65. *Matters raised by the delegate*

66. The delegate expressed concern about the small wedding celebration held in the review applicant's apartment and said that from a cultural perspective this was uncommon and that most Moroccan weddings involve large and elaborate customs. During the interview conducted on 7 June 2016 the visa applicant said they had not wanted a large celebration. When it was noted that this was unusual the visa applicant said they will have large celebration when the visa is granted.
67. The review applicant told the Tribunal that the small celebration held in his apartment on 2 March 2016 followed the parties' legal marriage but it was really an engagement celebration from a cultural stance. He said he did not have enough money for a big celebration at that time but when he returned to Morocco in October 2016 they had a big celebration in a hotel. He said there were 120 guests, all of who were family members or friends of the visa applicant. Photos of this celebration were provided to the Tribunal.
68. In the interview conducted on 7 June 2016 the visa applicant said she was not aware that the review applicant had tried to sponsor his former partner to Australia. The Tribunal asked the visa applicant about this and she said the review applicant had told her about his previous relationship.

69. *Conclusion*

70. Whilst the Tribunal was troubled by some of the review applicant's evidence, and in particular his sponsoring of a partner visa application at a time when he was not in a genuine relationship with the applicant, it did not consider that this necessarily tainted the partner visa application currently before the Tribunal.
71. The review applicant's evidence was generally consistent and his explanations for matters raised by the delegate were plausible. In addition the review applicant has provided significant documentary evidence.
72. The Tribunal placed weight on the financial aspects of the relationship and the nature of the parties' commitment to each other.
73. Having regard to all of the evidence, the Tribunal concludes as follows:
- The parties are married to each other under a marriage that is valid for the purposes of the Act;
  - they are not living separately and apart on a permanent basis and that they see their future as a long term one;
  - they have a mutual commitment to a shared life together to the exclusion of others; and
  - that the relationship is genuine and continuing.
74. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship.
75. Therefore the visa applicant meets cl.309.211(2) and cl.309.221.
76. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

## **DECISION**

77. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211(2) of Schedule 2 to the Regulations
  - cl.309.221 of Schedule 2 to the Regulations

Christine Kannis  
Member



## **ATTACHMENT - Extract from Migration Regulations 1994**

### **1.15A Spouse**

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day-to-day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).